**Formal Constitutional Scholarship on the**

**American Presidency: A Literature Review**

A literature review (also known as a literature survey or bibliographic essay) is a common assignment across the disciplines.

For over three decades, scholarship on the American presidency has taken place beneath the shadow of Richard Neustadt's *Presidential Power[[1]](#endnote-1)* [[2]](#endnote-2)[1] , first published in 1960 and periodically updated since that time. Neustadt's book can be seen to also exist beneath a larger shadow cast by the developing notion of a modern presidency that dated from the administration of Franklin Roosevelt and that represented a transformation from the previous, more traditional presidency.[[3]](#endnote-3) [2] This modern presidency recognized the informal leadership powers of the president and argued that these powers overshadowed the formal constitutional powers of the traditional presidency, and that they were especially necessary for effective government. Neustadt's book also displaced Edward S. Corwin's *The President: Offices and Powers* as the dominant work in presidential scholarship. Corwin describes his work as "primarily a study in American public law," and its central theme as "the development and contemporary status of presidential power and of the presidential office under the Constitution" which did not ignore "the personal and political aspects of the subject."[[4]](#endnote-4) [3] Neustadt explicitly rejects this approach, defining his theme rather as "personal power and its politics: what it is, how to get it, how to keep it, how to lose it," and further declaring "this is not a book about the Presidency as an organization or as legal powers or as precedents or as procedures.”[[5]](#endnote-5) [4] Neustadt's approach represents a fundamental shift of emphasis in scholarship on the presidency and it has had a profound influence on subsequent scholarship.[[6]](#endnote-6) [5]

This emphasis on presidential power floundered under the perceived irresponsible usurpations of power evidenced in Lyndon Johnson's Vietnam policy and Richard Nixon's campaign irregularities that resulted in the Watergate break-in by people associated with his White House and campaign organizations. Scholarship on the presidency began to seek an antidote to uncontrolled presidential power, which eventually led back to the Constitution. This paper will consider some of the scholarship of the past fifteen years that represents a return to the Constitution as a primary source of presidential power and authority. It will also address some of the alternative viewpoints as well as critiques and some derivative scholarship. As a focal point, I have chosen an essay by Joseph M. Bessette and Jeffrey Tulis, "The Constitution, Politics, and the Presidency," and scholarship that has followed from that essay as well as closely associated efforts. Bessette and Tulis' essay provides a clearly stated review of recent presidential scholarship as well as a foundation for rehabilitating the Constitution as a continuing source of political and legal guidance for the American presidency within the framework of constitutional separation of powers. They hark back to Corwin and his public law approach to presidential scholarship, but theirs is not simply a restatement of Corwin. Instead, Bessette and Tulis encourage a re-combining of the then divergent legal and political approaches to study of the presidency, a joining that recognizes the legal limitations upon the office while at the same time acknowledging the political range of activities available to the President, some of them even extra-legal when necessity dictates, that are built into the Constitution and operate daily through the doctrine of separation of powers.[[7]](#endnote-7) [6] This essay, while perhaps not the source of a significant body of research, nonetheless clearly stakes out the territory within which a significant body of scholarship has developed.

**Formal Constitutionalist**

I have chosen the title formal constitutionalist for that scholarship following from and associated with Bessette and Tulis' understanding. These scholars demonstrate a consistent attachment to and respect for the forms embodied in the Constitution. Authority and power for the president flow from the Constitution itself, not from informal and extra-constitutional attributes or from the necessity to deal with a changed world. In theft view, the Constitution provides for the exercise of personal power, as well as for the exigencies that spring from development and necessity. Scholarship in this category includes the work of Harvey Mansfield, Jr., Jeffrey Tulis, David Nichols, and Terry Eastland in addition to the essay by Bessette and Tulis.

*Bessette and Tulis*

In "The Constitution, Politics, and the Presidency," Bessette and Tulis argue two main points. First, political behavior can be founded upon, and is perhaps best founded upon, the Constitution. The day to day operations of government which include the bargaining, negotiating, power plays, and conflict between the separate branches, not only take place within the constitutional framework, but are shaped by that framework. Because political actions must be consistent with constitutional guidelines, "the necessity to find some constitutional grounds for questionable political acts may itself influence the selection or character of the actions.''[[8]](#endnote-8) [7] Thus, various questions of policy as well as the propriety of actions are informed by constitutional considerations, though they may be so routine as to be overshadowed by the question of the moment. The president acts within these constraints, as do the other branches of government, and endeavors to achieve his goals, pursuing that end as a guardian of the constitutional forms in his own right.[[9]](#endnote-9) [8] The president has considerable leeway within which to act, with the fundamental imperative at one end to preserve the office of the presidency from being overpowered, and the requirement to consider the possibility of strong attempts by the other branches to rein in an executive run amok. The constitutional separation of powers allows for vast differences in presidential personality, ambition, and leadership within the aforementioned limits.[[10]](#endnote-10) [9]

The second major point Bessette and Tulis wish to make is regarding the nature of the executive. The executive by design is the branch of government endowed with the energy and unity to act on bold designs as well as to react quickly to emergency, crisis, or threat.[[11]](#endnote-11) [10] This energy in the executive, which is very similar to the prerogative power identified by John Locke in his *Second Treatise On Government*, is difficult to bring under the control of law. Necessity or circumstance may dictate a course of action that requires extra-legal action by the executive in a good cause. A tension thus resides in the executive, as witnessed by Abraham Lincoln's extraordinary actions during the Civil War, actions justified by the very laudable goal of preserving the Constitution, the union, and republican government.[[12]](#endnote-12) [11] These type of extraordinary actions are outside the realm of control by law. Therefore the genius of the Constitution is seen in its "competing structures of power which would have both the inclination and the means to oppose aggrandizement by any one branch.''[[13]](#endnote-13) [12] The executive will be constrained from acquiring excessive power through political, not legal, means. This political control is found at its origin in the Constitution, not in informal powers, or other extra-constitutional sources. In this way, the Constitution provides means to cope with necessity that are consistent with constitutional government.

*The Ambivalent Executive*

Harvey Mansfield has written extensively on the executive, generally on topics that would fall under Bessette and Tulis' second main point regarding the nature of the executive. Mansfield traces the history of the executive in political thought to demonstrate that the executive we know as the American President is primarily a product of modern political thought, and that the presidency is ambivalent in the sense that it is both limited and unlimited by law which creates a tension in the office by its very nature. Still, the executive is not suitable for the United States until it is made compatible with republican government.[[14]](#endnote-14) [13]

The executive power as we know it, Mansfield argues, is foreign to the political thought of Aristotle, and does not begin to take recognizable shape until the writings of Machiavelli. Aristotle did not speak of different powers in government, but rather different elements that made up the regime. These different elements consisted of the deliberative, that of offices or magistracies, and the judging element. These elements of the regime bear a resemblance to American separation of powers on their face, but are really not commensurate.[[15]](#endnote-15) [14] These elements of Aristotle's regime clearly mixed the powers which in American government are institutionally separated, and Aristotle clearly stated that the deliberative was the sovereign element. The deliberative element in particular exercised powers that would cross the boundaries of all three separate powers outlined in the American Constitution. The magistracies, those powers we would associate most readily with the executive, were many, divided, and subordinate to the deliberative element. Not until the writings of Machiavelli do we begin to see the executive take shape, but primarily in a fear- and awe-inspiring form. The executive recognizes no limits but necessity.[[16]](#endnote-16) [15] Locke softens the executive by making this power subordinate to the legislature, the supreme power, and the law, but also grants the executive a power of prerogative to act outside the law when necessity dictates.[[17]](#endnote-17) [16] Montesquieu softens the executive still further by placing the role of punishment in another separate power, the judiciary. The most fearful of executive powers, punishment, is then made acceptable to democrats through the judicial institution of the jury, judgment by one's peers.[[18]](#endnote-18) [17]

The executive, then, is ambivalent, or pulled in two direction by the very character of the office. As the executor of the laws, the executive is subordinate to those that make the law, but in order to carry out the force of law against recalcitrant violators of the law, extra-legal measures must be available to ensure that the law is in fact enforced. The president is at one and the same time endowed with an office limited by law and powers that go beyond law according to the dictates of necessity.[[19]](#endnote-19) [18] The task remains to make the president compatible with republican government. The solution is found in representation, by which "the people choose to limit themselves; they choose not to govern directly themselves."[[20]](#endnote-20) [19] Representation incorporates a filtering effect between the people and government which encourages the selection of worthy individuals as representatives and insulates those same representatives from the temporary passions of the people. The executive is thus not tempted into demagoguery by the clamoring will of the people, and is held in check by the separate and co-equal branches of the government.

*The Rhetorical Presidency*

The argument that the presidency had evolved into a rhetorical presidency was first developed by James Ceaser, Glen Thurow, Jeffrey Tulis, and Joseph Bessette in a 1981 article entitled "The Rise of the Rhetorical Presidency?[[21]](#endnote-21) [20] This theme was picked up and carried on by Jeffrey Tulis.~ in a number of articles, and in a book entitled The Rhetorical Presidency.[[22]](#endnote-22) [21] The rhetorical presidency is viewed by these scholars as not merely a matter of style, but as a serious modification of the constitutional order. As such this vein of scholarship fits under the first main point of the Bessette and Tulis essay, the constitutional source of political behavior.

The rise of this rhetorical presidency, Ceaser and his co-authors assert, is founded on three developments: "(1) a modern doctrine of presidential leadership, (2) the modern mass media, and (3) the modern presidential campaign.”[[23]](#endnote-23) [22] The most important of these three is the change in doctrine, for through the nineteenth century presidential rhetoric was more circumspect and confined to communications within government or ceremonial speeches. Not until the twentieth century did the president begin to appeal directly to the people on policy grounds in order to pressure Congress from below.[[24]](#endnote-24) [23] An emphasis upon popular presidential rhetoric can result in an "opinion that speaking is governing,"[[25]](#endnote-25) [24] and become so routine as to be disregarded.[[26]](#endnote-26) [25]

A further complication arises as expert communication within government begins to conflict with popular rhetoric from the president to the public at large. Tulis points out that "the arguments presidents make to the people are different from those they make to Congress," and "each kind of argument can be used to impeach the other.''[[27]](#endnote-27) [26] The result is to "delegitimate" the office to a certain degree for subsequent presidents, and to weaken the office by unreasonably raising public expectations to the point that government cannot fulfill those expectations, creating a rising cynicism in the public.[[28]](#endnote-28) [27]

The constitutional issue brought to the fore by considerations on the rhetorical presidency is the disjunction between traditional presidential practice within constitutional limits, and a new practice of direct public appeal which circumvents the constitutional design of separated powers. Tulis argues that Woodrow Wilson in effect superimposed this new practice over the traditional practice which was consistent with constitutional forms. By superimposing a new constitutional understanding upon the foundation of the old constitutional understanding without amending or modifying the Constitution itself, an inevitable tension resulted between the two fundamentally opposed positions.[[29]](#endnote-29) [28] Thus, the presidency today is fundamentally different today than a century ago, but because of the tension between opposed understandings of the proper source of presidential authority, the task of governing is made more difficult, is undermined, and breeds a virulent public cynicism toward the government.

*The Energetic Executive*

Terry Eastland argues that presidential authority comes unequivocally from the Constitution, and that the powers granted by the Constitution are altogether sufficient for the requirements of daily governing as well as for contingencies of an extraordinary nature.[[30]](#endnote-30) [29] Eastland forthrightly declares that his "book may be read as a corrective to Presidential Power, a constitutional corrective, to be precise." He specifically takes issue with Neustadt's assessment of separation of powers as "separated institutions *sharing* power."[[31]](#endnote-31) [30] The powers, as vested in the Constitution, Eastland argues, are of three different kinds according the understanding of separation of powers held by the framers, not one undifferentiated mass shared among the different branches as Neustadt argues. Eastland, thus falls under that first main point made by Bessette and Tulis in their essay.

Eastland draws heavily from Mansfield, Bessette, and Tulis as he lays out his approach to the presidency. He does not, however, go so far as to accept the appellation of rhetorical in regard to the presidency. Rhetoric plays a signal role in the exercise of presidential power, and therefore, he eschews the term rhetorical presidency because of the pejorative sense it conveys.[[32]](#endnote-32) [31]

The presidency portrayed in *Energy in the Executive* is forceful and active in the roles of legislative leadership, protection of the executive, administration of the bureaucracy, and appointment of judges. In this assessment of the Reagan and Bush presidencies, Eastland is quite apparently arguing for acceptance of an active and powerful president among conservatives. Despite this apparent partisanship, Eastland does provide a forcefully argued defense of an explicitly constitutional presidency.

*The Mythical Modern Presidency*

The concept of the modern presidency as a fundamentally different institution than the traditional nineteenth-century presidency is powerful and widely held, as discussed above.[[33]](#endnote-33) [32] David K. Nichols attempts to debunk the myth of this modern presidency. His is an explicitly constitutional argument, in which he asserts that all the attributes of the modern presidency have their source in the Constitution.[[34]](#endnote-34) [33] Nichols asserts that the true change "is that recent Presidents do more than previous Presidents, but that is traceable to the simple fact that modern American government as a whole does more."[[35]](#endnote-35) [34] Nichols also considers the central fact of the president's place in the constitutional order, and thus falls under Bessette and Tulis' first main point.

This argument is different than most of those already examined in this category in that there is no fundamental transformation in the executive office, either constitutional or extra-constitutional. The problem of the modern presidency is that it has forgotten its constitutional roots. This failure works to undermine the authority of the presidency, since "by failing to recognize the constitutional origins of the major elements of the modern Presidency, the doctrine of the modern Presidency ignores the extent to which the Constitution shapes contemporary political behavior."[[36]](#endnote-36) [35] Further, Nichols argues that the modern problem is not with the presidency, "but that we expect too much of the government."[[37]](#endnote-37) [36]

**Alternatives to Formal Constitutionalism**

The formal constitutionalists, as I have chosen to refer to them, have produced a significant body of literature. Theirs, however, is not the only body of literature that challenges the reining orthodoxy of the modern presidency. Two scholars, Stephen Skowronek and Jean Schroedel, represent an historical and developmental approach to the presidency that transcends the limits of periodization inherent in concepts such as the modern presidency. Skowronek has developed the concept of the presidency in political time[[38]](#endnote-38) [37] while Schroedel has developed the concept of dynamic constitutionalism.[[39]](#endnote-39) [38] Sidney Milkis, on the other hand, defines the modern presidency by its separation from the informal constitutional link of political parties.[[40]](#endnote-40) [39] He argues that the modern presidency was a conscious creation of Franklin Roosevelt by severing the party connection and creating a direct connection between government and the public through programmatic activism that undermined the role of political parties.

*The Presidency in Political Time*

The concept of the presidency in political time centers on three simultaneous "dynamics" or "orderings." These are the constitutional or persistent, the organizational or emergent, and the political or recurring orderings.[[41]](#endnote-41) [40] Through the course of the argument, Skowronek makes clear that the focus of his scholarship are on the emergent and recurring orderings. Progress and development occurs along the emergent time line, which he designates secular time. The recurring birth, life and death of political regimes occurs in cycles of political time. One examines similar presidents across time by their position within regime cycles, so, for example, Jefferson can be compared with Franklin Roosevelt as a regime founder.[[42]](#endnote-42) [41] This model breaks the grip of the modern presidency by incorporating all presidents in a comprehensive treatment. With its focus on development and political regimes as the active elements, Skowronek is primarily interested in successful policy making, or in comparison, relative success in policy making.

The constitutional, or persistent, ordering maintains a relatively static position in Skowronek's model. The Constitution provides a foundation upon which the action occurs, but remains static in comparison to both political and secular time. The constitutional realm is where "each new president seizes control of the formal powers of his office and attempts to exercise them in his own right,''[[43]](#endnote-43) [42] and it is a link "between presidents past and present in a timeless and constant struggle over the definition of their institutional prerogatives."[[44]](#endnote-44) [43] There is then no sense, then of a constitutional crisis or failure as seen in the formal constitutionalists. The Constitution apparently continues to exert the same forces and perform the same role over time despite whatever political or developmental changes occur. In this Skowronek is similar to David Nichols, though Nichols formulates a much more active role for the Constitution in daily political behavior than does Skowronek.

*Dynamic Constitutionalism*

Dynamic constitutionalism is more of a systemic approach than Skowronek's; it incorporates the daily influence of constitutional arrangements in policy making between Congress and the president, and it appears to be much more respectful of formal constitutional limits. Schroedel differs from the formal constitutionalists in maintaining a focus on governing through policy making, emphasizing the instrumental influences of electoral politics, and retaining Neustadt's conception of the separation of powers as "separated institutions sharing power."

The argument focuses upon the comparative formal legislative powers of Congress and the president. Dynamic constitutionalism recognizes that the fundamental power of legislating resides in Congress, and that the president has relatively little power to legislate, formally. The legislative initiative remains with Congress.[[45]](#endnote-45) [44] This seems a reasonable assertion, but may denigrate the significant presidential power over legislation through the formal power of the veto. Further, the electoral dynamics of the presidency, long term and national constituency, act to limit the depth of presidential involvement in initiation of legislation.[[46]](#endnote-46) [45] Dynamic constitutionalism incorporates a much needed return to the Constitution in discussing government policy making, but, at least as presented in "Legislative Leadership Over Time," may fail to capture the full influence of constitutional politics upon initially defining legitimate policy options.

*Parties and Presidents*

The political parties are an extra-constitutional development in American politics. They became the mechanism through which presidents were nominated and supported through the campaign. Parties became the institution through which citizens by and large interacted with the government, and they were a source of loyal personnel from which a new administration could staff itself. Sidney Milkis argues that Franklin Roosevelt set about consciously severing the presidency from this party link.[[47]](#endnote-47) [46] This was accomplished through two means. First, Roosevelt set about modifying Democratic Party rules, specifically convention rules for the selection of a presidential candidate.[[48]](#endnote-48) [47] The second initiative was to reform the executive branch toward the goal of enlightened administration. This was achieved in 1939 through the Executive Reorganization Act which resulted in the capacity of the president to "govern in the absence of party government.''[[49]](#endnote-49) [48] This resulted in the growth of administrative government in pursuit of fulfilling a programmatic agenda. The burgeoning growth of government under Lyndon Johnson's Great Society in pursuit of programmatic aims, and the attempts by Richard Nixon to outflank a recalcitrant, opposition Congress through administrative government are both results of the modern presidency established by Franklin Roosevelt.[[50]](#endnote-50) [49]

**Companions, Critics, and Derivations**

The literature of the formal constitutionalists has attracted scholars of similar opinion, drawn criticism, and resulted in derivative scholarship that by and large avoids the constitutional center of the formalists’ arguments. Some of these responses will now be considered.

*Companions*

Herman Belz[[51]](#endnote-51) [50] has argued that Abraham Lincoln fostered a renewed appreciation of constitutional government in the people. Further, he asserts that Lincoln adhered to the Constitution, even when acting beyond the law, this was done under presidential discretion in the effort to preserve constitutional government. This discretion, Belz argues, is inherent in the executive power as created in the Constitution. In this he resembles Bessette and Tulis, and Harvey Mansfield who recognize broad inherent executive power in the Constitution, but power that is limited and legitimated by its inclusion in a written Constitution.[[52]](#endnote-52) [51] Thus, suspension of the writ of habeas corpus by Lincoln is not a despotic, but rather a constitutional act.

From a legal point of view, Henry Monaghan[[53]](#endnote-53) [52] and Erwin Chemerinsky[[54]](#endnote-54) [53] argue for a more explicitly legal understanding of executive power. Monaghan addresses the legal nature of the executive power and what it is, specifically. Chemerinsky aims to provide the grounds for a judicial review of executive actions as a legal limitation of executive power. These analyses, while friendly to the formalists, suffer from the lack of political perspective Bessette and Tulis associate with legal scholars of the presidency.[[55]](#endnote-55) [54]

Thomas Engeman[[56]](#endnote-56) [55] addresses the ambivalent nature of the executive, which calls upon the president to bargain and compromise in normal times, but to step out front and lead in extraordinary times. Even so, that prerogative power to lead in times of necessity is a limited one, and it is the separation of powers that can ensure that presidential prerogative remains within the bounds of constitutional government.[[57]](#endnote-57) [56]

*Critics*

The concept of the rhetorical presidency has come under criticism both harsh and sympathetic. Philip Abbott[[58]](#endnote-58) [57] discerns great flaws in the rhetorical presidency of Ceaser, et al. Stephen Skowronek,[[59]](#endnote-59) [58] on the other hand, finds Jeffrey Tulis' *The Rhetorical Presidency* at the worst confusing on some issues, but generally worthwhile for opening new avenues of presidential scholarship.

Abbott argues that Ceaser, et al., misunderstand the nature of the presidency based upon three points. First, he asserts, the president has always been rhetorical. Second, presidential rhetoric of the twentieth-century does not differ from that of the nineteenth century in incorporating American principles. Third, the alternative Abbott finds to the rhetorical presidency is a bland managerial presidency, that he determines to be wholly unsuitable.

Skowronek appreciates Tulis' view of the current presidency as a layered text, with a newer understanding of the role of the presidency superimposed upon the constitutional foundation. In this, Skowronek finds a tremendous source for future analysis of additional layers to this text.[[60]](#endnote-60) [59] What Skowronek finds unfulfilling is an undifferentiated consideration of nineteenth-century presidents that does not explain the anomalous presidencies of Jackson, Polk, Lincoln, and Cleveland. In addition, he finds the identification of Wilson as the progenitor of the rhetorical presidency confusing since Wilson's ideas seemed to fall into disrepute with the end of his administration.[[61]](#endnote-61) [60]

*Derivations*

A number of articles address derivative issues that are identified with the thought of the formal constitutionalists. Most common among these are studies of presidential rhetoric. Lyn Ragsdale[[62]](#endnote-62) [61] analyzes presidential speeches and categorizes them into three groups depending upon whether they were inclusive, discordant, or impassive in the way they influenced the public. Nicol Rae[[63]](#endnote-63) [62] discerned a shift in political cleavages from class based to culture based as the public president rose with the improvements in media and the decline of parties. Patrick Fett[[64]](#endnote-64) [63] analyzed the rhetorical strategies of presidential candidates for addressing legislative goals, and found both Carter and Reagan to have been remarkable truthful about theft legislative goals during theft campaigns. Dwight Anderson[[65]](#endnote-65) [64] finds presidential rhetoric to be a legitimating influence by linking power and principle. Each of these studies, while dealing with presidential rhetoric, does not address the fundamental constitutional problems that the formalists associate with recent presidential rhetoric.

**Evaluation**

The fundamental issue of the great mass of this literature is the question of the extent to which the Constitution created an executive that today can best be understood in reference to the Constitution itself, or whether time and circumstance have eroded the significance of the original constitutional provisions. The formal constitutionalists, as I have called them, heartily agree that the Constitution still provides the best foundation for both understanding the presidency and assessing the proper and legitimate range of powers available to the president. This scholarship responds to previous work that either seeks to limit the prerogative power of the president through legal restrictions, or seeks to base presidential power somehow in an extra-constitutional direct connection to the public. In arguing for a restoration of a constitutional understanding of the presidency and its place in the constitutional order, the formalists recognize that the president has a broad range &powers available to him based on one end in preserving the office itself and limited at the other by the political action of the other branches in response to presidential overreach. The foundation of this understanding is the separation of powers.[[66]](#endnote-66) [65]

The modern understanding of separation of powers as "separated institutions sharing powers''[[67]](#endnote-67) [66] confuses the constitutional language on powers. At the head of the first three articles, a specific power is vested in a particular institution. The Constitution vests "all legislative Powers herein granted" in Congress at the head of article one; "the executive Power" in a President at the head of article two; and "the judicial Power" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" at the head of article three.[[68]](#endnote-68) [67] Of course, the powers are not isolated in their separation, as the president exercises a qualified veto over legislation, a legislative power, and the Senate advises and consents on appointments and ratifies treaties, executive powers. Yet it would be difficult to argue that these incursions somehow undermine the distinct character of the majority of powers exercised by any particular branch. Indeed, an undifferentiated concept of powers would eliminate the need for a separate doctrine of checks and balances, for the two are distinct conceptions. If we are to differentiate, then, between separation of powers and checks and balances, one must operate under the aegis of the other. It seems clear that separation of powers is the superior, and that therefore checks and balances must occur within similar powers. So, the presidential veto becomes a check on legislative ambition, though it may function also in the capacity of preserving the independence of the presidency as a separate power.[[69]](#endnote-69) [68] A restoration of the original understanding of separation of powers is crucial to an effort to restore the presidency to its proper place in the constitutional order.

The consideration of policy making as the signal role of governing also limits the effort to understand the president's place in the constitutional order. Indeed, it is the concentration on policy making that *Tulis,* Ceaser, et al., Nichols, and Milkis illuminate as a contributing factor to the presidency in modern times exceeding its constitutional role. Woodrow Wilson appealing directly to the people in an effort to pressure Congress demonstrates a focus on policy to the detriment of constitutional procedure. The same can be said for the expansion of government to achieve programmatic goals under Franklin Roosevelt and Lyndon Johnson. No less is it true for Richard Nixon and Ronald Reagan in their efforts to circumvent Congress through wielding the administrative power of the state in pursuit of policy goals that Congress did not approve of. This is not to say that the policy goals themselves were illegitimate, but to say that in many cases the methods and procedures used to achieve them may have undermined the authority of legitimate constitutional procedure. The first goal of governing should be to maintain the integrity and dignity of constitutional government itself, then, once that is ensured, to pursue those policy goals consistent with such government. If policy is allowed to drive government, then the constitutional safeguards that protect the country from unconstitutional exercises of power may be diminished and ultimately overlooked.[[70]](#endnote-70) [69]

Each of the scholars considered in the first two sections of this paper have contributed significantly to a fuller, richer understanding of the place of the president in the constitutional order. Though there is disagreement among them about certain defining characteristics of modern presidential practice, each works to restore an understanding of and appreciation for presidential practice throughout the life of the American republic. These are profound contributions that have worked to reinvigorate the study of the American presidency. One may read of an imperial presidency, an imperiled presidency, administrative, institutional, weak, strong, rhetorical, modern, and traditional presidencies. In each might reside much or only some of the character of the whole presidency. The true benefit of a return to a constitutional assessment of the presidency is the capacity to begin to understand how each of these might apply to the presidency at a particular time or in a particular set of circumstances. For the presidency is a broad and flexible office that operates in a constitutional system of co-equal and coordinate branches, each working with and against the others to maintain the constitutional balance proper to the conditions of the time. The imperial presidency did not usher in the end of constitutional government, but instead fostered a resurgence in congressional power to offset the overly ambitious executive. The resilience of constitutional government is one of its greatest benefits, and remains a particularly strong reason to maintain a vigilant guard over its continuance. The powerful, energetic presidency occupies a position in the constitutional order that is uniquely suited to maintaining that vigilance. The formal constitutionalists, as I have called them, have performed a valuable service in illuminating the proper constitutional role of the presidency.

1. [1] Richard E. Neustadt, Presidential Power: The Polities of Leadership (New York: John Wiley and Sons, Inc., 1960). The latest version is Presidential Power and the Modern Presidents: The Politics of Leadership From Roosevelt to Reagan (New York: The Free Press, 1990). [↑](#endnote-ref-1)
2. [↑](#endnote-ref-2)
3. [2] See Fred I. Greenstein, "Introduction: Toward a Modern Presidency," and "Nine Presidents in Search of a Modem Presidency," in Leadership in the Modern Presidency (Cambridge, MA: Harvard University Press, 1988), 1-6, 296-352. Greenstein identifies four major changes that produced the modern presidency: "increased unilateral policy-making capacity, centrality in national agenda setting, far greater visibility, and acquisition of a presidential bureaucracy," p. 347. Arthur Schlesinger and William Leuchtenburg provide historical arguments for the break with the past represented in the presidency of Franklin D. Roosevelt. Arthur M. Schlesinger, Jr., The Age of Roosevelt: The Coming of the New Deal (Boston: Houghton Mifflin Company, 1958). William E. Leuchtenburg, "Franklin D. Roosevelt: The First Modern President," in Leadership in the Modern Presidency, ed. Fred I. Greenstein (Cambridge, MA: Harvard University Press, 1988), 7.40. Theodore Lowi dates the end of the traditional presidency and the beginning of what he terms the plebiscitary presidency from 1933. Theodore J. Lowi, The Personal President: Power Invested, Promise Unfulfilled (Ithaca: Cornell University Press, 1985), see in particular pages xi, 20, 22, 65, 99 for discussion of the changes. Burke, John P., "The Institutional Presidency," in The Presidency and the Political System, Third Edition, ed. Michael Nelson (Washington, DC: GQ Press, 1990), 383-408, provides a nice examination of the growth of the presidency as an institutionalized organization. Thomas E. Cronin, The State of the Presidency (Boston: Little Brown and Company, 1975), 5, focuses on "the manner in which recent presidents have tried to fulfill the responsibilities of national policy leadership," a fundamentally modem view of the presidency, though he does express a need to stay "within the Constitution," (25) his goal is to achieve a more democratic presidency. [↑](#endnote-ref-3)
4. [3] Edward S. Corwin, The President: Offices and Powers, 1787-1957 (New York: New York University Press, 1957), vii. [↑](#endnote-ref-4)
5. [4] Neustadt (1990), Preface to the First Edition, xx. [↑](#endnote-ref-5)
6. [5] See Joseph M. Bessette and Jeffrey Tulis, "The Constitution, Politics, and the Presidency." In The Presidency in the Constitutional Order, ed. Joseph M. Bessette and Jeffrey Tulis (Baton Rouge: Louisiana State University Press, 1981), 3-30. Douglas J. Hoekstra, "Presidential Power and Presidential Purpose." The Review of Politics 47, no 4 (October 1985): 566-87. Stephen Skowronek, The Politics Presidents Make: Leadership from John Adams to George Bush (Cambridge, MA: The Bellknap Press, 1998), 4-7. [↑](#endnote-ref-6)
7. [6] Bessette and Tulis, 7-29. See especially 27-28 where they define the range of presidential action which is allowed under separation of powers. The lower limit is defined by the president in protecting the very existence of the office, while the upper limit is defined by the Congress and Supreme Court in battling to preserve themselves from an overly ambitious president. [↑](#endnote-ref-7)
8. [7] Ibid., 10. [↑](#endnote-ref-8)
9. [8] Ibid., 12. [↑](#endnote-ref-9)
10. [9] Ibid., 16. [↑](#endnote-ref-10)
11. [10] Alexander Hamilton, James Madison, and John Jay, The Federalist Papers, Introduction by Clinton Rossiter (New York: New American Library, 1961), #72, 437; #70, 423-4. [↑](#endnote-ref-11)
12. [11] Bessette and Tulis, 21. [↑](#endnote-ref-12)
13. [12] Ibid., 18. [↑](#endnote-ref-13)
14. [13] Harvey C. Mansfield, Jr., "The Ambivalence of Executive Power." In The Presidency in the Constitutional Order, ed. Joseph M. Bessette and Jeffrey Tulis (Baton Rouge: Louisiana state University Press, 1981), 314-33. "The Absent Executive in Aristotle's Politics." In Natural Right and Political Right: Essays in Honor of Harry V. Jaffa, ed. Thomas B. Silver and Peter W. Schramm (Durham, NC: Carolina Academic Press, 1984), 169-196. "Republicanizing the Executive." In Saving The Revolution: The Federalist Papers and The American Founding, ed. Charles R. Kesler (New York: The Free Press, 1987), 168.184. "The Modem Doctrine of Executive Power." Presidential Studies Quarterly XVII, no 2 (Spring 1987): 237.52 See also Taming the Prince: the Ambivalence of Modem Executive Power (New York: The Free Press, 1989) by the same author, which incorporates much of the argumentation from the above listed articles into a coherent argument about the development of modem executive power and its inherently ambivalent nature. [↑](#endnote-ref-14)
15. [14] Mansfield, "Absent Executive," and "Modem Doctrine," 238-42. [↑](#endnote-ref-15)
16. [15] Mansfield, "Modem Doctrine," 242-4. [↑](#endnote-ref-16)
17. [16] Ibid., 244-7. [↑](#endnote-ref-17)
18. [17] Ibid., 248-51. [↑](#endnote-ref-18)
19. [18] Mansfield, "Ambivalence," 317-8. [↑](#endnote-ref-19)
20. [19] Mansfield, "Republicanizing," 171. [↑](#endnote-ref-20)
21. [20] James Ceaser, Glen E. Thurow, Jeffrey Tulis, and Joseph M. Bessette. "The Rise of the Rhetorical Presidency." In Rethinking the Presidency, ed. Thomas E. Cronin (Boston: Little, Brown and Company, 1982), 233-52. The article first appeared in the Spring 1981 Presidential Studies Quarterly. [↑](#endnote-ref-21)
22. [21] Jeffrey Tulis, "The Two Constitutional Presidencies." In The Presidency and the Political System, 3rd ed., ed. Michael Nelson (Washington, DC: CQ Press, 1990), 85-115. The Rhetorical Presidency. (Princeton, NJ: Princeton University Press, 1987). "The Constitutional Presidency in American Political Development." In The Constitution and the American Presidency, ed. Martin Fausold and Alan Shank (Albany: State University of New York Press, 1991), 133-46. [↑](#endnote-ref-22)
23. [22] Ceaser, et al., 237. [↑](#endnote-ref-23)
24. [23] Ibid., 238. [↑](#endnote-ref-24)
25. [24] Ibid., 234. [↑](#endnote-ref-25)
26. [25] Ibid., 247. "Moreover, to the extent that presidents can pressure Congress through popular appeals, such a strategy, like crying wolf, is likely to work less well the more often it is used." [↑](#endnote-ref-26)
27. [26] Tulis, "Two Presidencies," 108-9. See also, "Rhetorical Presidency," 12, 17. [↑](#endnote-ref-27)
28. [27] Tulis, "Two Presidencies," 109, Ceaser, et al., 236. [↑](#endnote-ref-28)
29. [28] Tulis, "Two Presidencies," 107, "Rhetorical Presidency," 17-8. [↑](#endnote-ref-29)
30. [29] Terry Eastland, Energy in the Executive: The Case for the Strong Presidency (New York: The Free Press, 1992). [↑](#endnote-ref-30)
31. [30] Ibid., 8. Neustadt, quoted in Eastland, 8. [↑](#endnote-ref-31)
32. [31] Ibid., 328, note 1. [↑](#endnote-ref-32)
33. [32] See note 2, above, on the idea and development of the modern presidency. [↑](#endnote-ref-33)
34. [33] David K. Nichols, The Myth of the Modern Presidency (University Park, PA: The Pennsylvania State University Press, 1994), 7. [↑](#endnote-ref-34)
35. [34] Ibid. [↑](#endnote-ref-35)
36. [35] He argues that the modern presidency 3~ Ibid., 9. [↑](#endnote-ref-36)
37. [36] Ibid., 10. [↑](#endnote-ref-37)
38. [37] Stephen Skowronek, "Presidential Leadership in Political Time." In The Presidency and the Political System, 3d ed., ed. Michael Nelson (Washington, DC: CQ Press, 1990), 117-61. The Politics Presidents Make: Leadership from John Adams to George Bush (Cambridge, MA: The Belknap Press, 1993). [↑](#endnote-ref-38)
39. [38] Jean Reith Schroedel, "Legislative Leadership Over Time." Political Research Quarterly 47, no. 2 (June 1994): 439-65. [↑](#endnote-ref-39)
40. [39] Sidney M. Milkis, "The Presidency and the Political Parties." In The Presidency and the Political System, 3d ed., ed. Michael Nelson (Washington, DC: CQ Press, 1990), 353-79. [↑](#endnote-ref-40)
41. [40] Skowronek, "Politics," 9-10, "Political Time," 117-8. [↑](#endnote-ref-41)
42. [41] Skowronek, "Politics," 33-58. [↑](#endnote-ref-42)
43. [42] Ibid., 9. [↑](#endnote-ref-43)
44. [43] Idem, "Political Time," 117. [↑](#endnote-ref-44)
45. [44] Schroedel, 44A.. [↑](#endnote-ref-45)
46. [45] Ibid. [↑](#endnote-ref-46)
47. [46] Milkis, 353. [↑](#endnote-ref-47)
48. [47] Ibid., 354-6. [↑](#endnote-ref-48)
49. [48] Ibid., 357. [↑](#endnote-ref-49)
50. [49] Ibid., 359-61,364-5. [↑](#endnote-ref-50)
51. [50] Herman Belz, "Abraham Lincoln and American Constitutionalism.' The Review of Politics 50, no. 2 (Spring 1988): 169-97. [↑](#endnote-ref-51)
52. [51] Ibid., 184-6. [↑](#endnote-ref-52)
53. [52] Henry P. Monaghan, "The Protective Power of the Presidency." Columbia Law Review 93, no. I (January 1993): 1-74. [↑](#endnote-ref-53)
54. [53] Erwin Chemerinsky, "Controlling Inherent Presidential Power: Providing a Framework for Judicial Review." Southern California Law Review 56, no. 4 (May 1983): 863-913. [↑](#endnote-ref-54)
55. [54] Bessette and Tulis, 7-8. [↑](#endnote-ref-55)
56. [55] Thomas S. Engeman, "Presidential Statesmanship and the Constitution: The Limits of Presidential Studies." The Review of Politics 44, no. 2 (April 1982): 266-82. [↑](#endnote-ref-56)
57. [56] Ibid., 280. [↑](#endnote-ref-57)
58. [57] Philip Abbott, "Do Presidents Talk Too Much? The Rhetorical Presidency and Its Alternative." Presidential Studies Quarterly XVIII, no. 2 (Spring 1988): 347-62. [↑](#endnote-ref-58)
59. [58] Stephen Skowronek, review of The Rhetorical Presidency, by Jeffrey K. Tulis. In Review of Politics 49, no. 3 (Summer 1987): 430-2. [↑](#endnote-ref-59)
60. [59] Ibid., 432. [↑](#endnote-ref-60)
61. [60] Ibid., 431-2. [↑](#endnote-ref-61)
62. [61] Lyn Ragsdale, "Presidential Speechmaking and the Public Audience: Individual Presidents and Group Attitudes." The Journal of Politics 49 (1987): 704-36. [↑](#endnote-ref-62)
63. [62] Nicol C. Rae, "Class and Culture: American Political cleavages in the Twentieth Century." The Western Political Quarterly 45, no. 3 (September 1992): 629-50. [↑](#endnote-ref-63)
64. [63] Patrick J. Fett, "Truth in Advertising: The Revelation of Presidential Legislative Priorities." The Western Political Quarterly 45, no. 4 (December 1992): 895-920. [↑](#endnote-ref-64)
65. [64] Dwight G. Anderson, "Power, Rhetoric, and the State: A Theory of Presidential Legitimacy." The Review of Politics 50, no 2 (Spring 1988): 198-214. [↑](#endnote-ref-65)
66. [65] Bessette and Tulis, 18, 28-9. [↑](#endnote-ref-66)
67. [66] Neustadt (1990), 29. [↑](#endnote-ref-67)
68. [67] The Constitution of the United States (Washington, DC: Commission on the Bicentennial of the United States Constitution, 1986), 1, 9, 12. [↑](#endnote-ref-68)
69. [68] See Eastland, 8-9 for a similar argument on the meaning of separation of powers. See also Hamilton, et al., numbers 47-51 for a discussion of separation of powers. Separation of powers iswidely seen to be in its origins as a combination of separation of powers and mixed government. These, when combined with bicameralism, "implemented the practice of checks and balances." Winton U. Solberg, ed., The Federal Convention and the Formation of the Union of the American States (Indianapolis: Bobbs-Merrill Educational Publishing, 1958), xxxix, liii. Further indication of the distinction between checks and balances and separation of powers can be found in Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution (Lawrence, KS: University Press of Kansas, 1985), 80-6, and Patti Eidelberg, The Philosophy of the American Constitution (New York: Free Press, 1968), 167-8. [↑](#endnote-ref-69)
70. [69] Bessette and Tulis, 10. [↑](#endnote-ref-70)